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ECOLAB INC.

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ECOLAB INC.,

Plaintiff,

V.

## ACE PROPERTY AND CASUALTY INSURANCE COMPANY,

## Defendant

Civil Case No.: 2:23-cv-00190

# **COMPLAINT FOR DECLARATORY RELIEF**

## DEMAND FOR JURY TRIAL

Plaintiff Ecolab Inc. (“Ecolab”) alleges for its Complaint against Defendant ACE Property Casualty and Insurance Company (“ACE”), as follows.

## **PRELIMINARY STATEMENT AND NATURE OF ACTION**

1. This is a civil action for declaratory relief arising out of ACE's insistence that it has no obligation to pay for defense and indemnity in connection with lawsuits involving alleged bodily injury arising from the purported use of Ecolab's OxyCide product, including the lawsuit filed by Jennifer Slamer and Christopher Slamer, Case No. CIVDS1709131, pending in the Superior Court of the State of California for the County of San Bernardino (the "Slamer Lawsuit"), until all triggered primary policies are exhausted. ACE sold umbrella insurance policies to Ecolab, including: ACE Umbrella Plus Commercial Umbrella Liability Policy No. G27423930 (policy period December 31, 2014 to December 31, 2015) and Policy No. G27930426 001 (policy period December 31, 2015 to December 31, 2016) (collectively, the "Policies").

## **PARTIES**

2. Plaintiff Ecolab is a corporation that provides water, hygiene, and infection prevention solutions and services and that is organized under the laws of the State of Delaware, with its principal place of business in St. Paul, Minnesota.

3. Defendant ACE is a corporation that is organized under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania.

## **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, as the parties are of diverse citizenship and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

5. ACE is subject to personal jurisdiction within the Central District of California by virtue of its extensive business operations in California and in this District and issuing policies that cover risks located within the State, including the insurance policy that it issued to Ecolab that is the subject of this action.

6. This action arises out of ACE's contacts with the State of California, including but not limited to having availed itself of the California market by selling the

1 insurance policies at issue in this action to cover alleged bodily injuries that occur to  
2 persons located in California and this District, and this Court may exercise personal  
3 jurisdiction over ACE.

4 7. Venue in this Court is proper under 28 U.S.C. § 1391(b)(2) for at least the  
5 following reasons: a substantial part of the events or omissions giving rise to Ecolab's  
6 claim ACE's responses to it occurred in this District, and the Policies insure Ecolab for  
7 alleged bodily injury that occurs to persons located in this District.

### **FACTUAL ALLEGATIONS**

#### **A. Ecolab Purchased Insurance To Protect Itself Against Liability Claims**

8 8. To protect itself against claims for liability by third parties, Ecolab  
9 purchased the Policies, for which ACE collected substantial premiums.

10 9. Section I.A of the Insuring Agreement in the Policies states that ACE "will  
11 pay on behalf of the 'insured' those sums in excess of the 'retained limit' that the  
12 'insured' becomes legally obligated to pay as damages because of 'bodily injury',  
13 'property damage' or 'personal and advertising injury' to which this insurance applies."  
14 The Policies apply to "bodily injury" that is caused by an "occurrence" and occurs during  
15 the "policy period."

16 10. The Policies, as modified by the Retained Limit Amendatory Endorsement –  
17 No Underlying Insurance (the "Retained Limit Endorsement"), define "retained limit" to  
18 mean "the total applicable self-insured limits listed in the Schedule of Retained Limits  
19 below." The Retained Limit Endorsement includes a table that states, in relevant part,  
20 that for "Products/Completed Operations" the "Retained Limit" is \$5,000,000 for "Each  
21 Occurrence" and \$15,000,000 in the "Aggregate."

22 11. The Policies define "products-completed operations hazard" to mean, in  
23 relevant part, "all 'bodily injury' . . . occurring away from premises you own or rent and  
24 arising out of 'your product' [.]"

1       12. The Policies define “bodily injury” to mean “bodily injury, sickness or  
2 disease sustained by a person, including death resulting from any of these at any time”  
3 and “includes mental anguish or mental injury resulting from bodily injury.”

4       13. The Policies define “occurrence,” with respect to “bodily injury,” to mean  
5 “an accident, including continuous or repeated exposure to substantially the same general  
6 harmful conditions. All such exposure to substantially the same general conditions shall  
7 be considered as arising out of the same ‘occurrence’, regardless of the frequency or  
8 repetition thereof, or the number of claimants.”

9       **B. The Slamer Lawsuit**

10      14. As alleged in the Slamer Lawsuit, Plaintiff Jennifer Slamer was employed as  
11 a registered nurse at Kaiser Permanente, a hospital in Fontana, California. She alleges  
12 that OxyCide, a product manufactured by Ecolab, was first introduced at Kaiser  
13 Permanente for disinfecting various surfaces at the hospital beginning in June 2015, and  
14 thereafter she allegedly experienced various physical symptoms whenever the product  
15 was used, culminating with a purported incident in February 15, 2016 that allegedly  
16 resulted in corresponding injuries that required her to be hospitalized (the “Incident”).

17      **C. ACE Insists On Exhaustion Of All Triggered Primary Policies**

18      15. By letter dated December 1, 2022, ACE acknowledged that each of the  
19 Policies “generally provides that coverage, if any, is afforded for those sums in excess of  
20 the ‘retained limit’ that the ‘insured’ becomes obligated to pay as damages because of  
21 ‘bodily injury’ to which the policy applies, but only if the ‘bodily injury’ occurs during  
22 the ‘policy period’ and is caused by an ‘occurrence’.” ACE did not dispute that Plaintiff  
23 Slamer alleges “bodily injury” or that her injuries occurred during the “policy period” or  
24 that they were caused by an “occurrence.”

25      16. But ACE argued that it had no obligation to provide coverage until Ecolab  
26 demonstrated that the “retained limit” had been satisfied, and the “retained limit” in  
27  
28

1 ACE's view meant the limits of all primary policies in effect during the time that Plaintiff  
2 Slamer allegedly sustained injuries:

3 Accordingly, at a minimum the 2014-15 and 2015-16 National Union Policies  
4 respond to the Slamer Lawsuit and must be appropriately exhausted before the  
5 corresponding [ACE] policies respond (if at all). Moreover, to the extent  
6 Plaintiff Slamer alleges injuries resulting from OxyCide exposure beyond the  
7 December 31, 2014 to December 31, 2016 policy periods, all underlying  
8 coverage must similarly be exhausted before any excess coverage afforded  
9 under the [ACE] policies would respond.

10 17. By email dated December 20, 2022, Ecolab asked ACE to explain its  
11 position that under the applicable law, "at a minimum the 2014-15 and 2015-16 National  
12 Union Policies . . . must be appropriately exhausted before the corresponding [ACE]  
13 policies respond (if at all)."

14 18. On January 3, 2023, ACE responded to Ecolab's December 20 email,  
15 reiterating its position and stating that "[C]overage (if any) under the [Chubb] excess  
16 policies would only be excess of the corresponding underlying policies, e.g., the 2014-15  
17 and 2015-16 National Union Policies, as applicable."

18 19. Ecolab has paid the required premiums in full and has satisfied all other  
19 conditions to coverage for the Slamer Lawsuit, or is otherwise excused from doing so.  
20 All actions taken by Ecolab with respect to the Slamer Lawsuit have been reasonable, and  
21 no action has prejudiced the ability of ACE to fulfill its contractual obligations. The  
22 Policies have been in full force and effect at all pertinent times.

23 20. The total amount of losses coming within the scope of coverage of one or  
24 more of the Policies that has been incurred and paid by Ecolab in connection with the  
25 Slamer Lawsuit, and that will be incurred or paid in the future, is not yet known or  
26 knowable, but is expected to be substantial relative to the collective limits of the Policies,  
27 and will reach, or could potentially reach, the Policies' respective attachment points,  
28 depending on multiple factors not yet known. ACE is responsible to pay all amounts that

1 have been, or will in the future be, incurred or paid by Ecolab in connection with the  
2 Slamer Lawsuit that are covered under the terms of the Policies it issued.

3 **FIRST CLAIM FOR RELIEF**

4 FOR DECLARATORY RELIEF RE: RIGHT TO SELECT POLICIES

5 21. Ecolab repeats and incorporates by reference each and every allegation  
6 contained in the preceding paragraphs as though fully set forth herein.

7 22. Ecolab seeks a declaration of the parties' rights and duties under the Policies  
8 in accordance with Section 1060 of the Code of Civil Procedure.

9 23. An actual controversy of a justiciable nature presently exists between Ecolab  
10 and ACE with respect to the retained limit that must be exhausted before ACE has a duty  
11 to pay under the Policies.

12 24. Ecolab contends subject to applicable terms of the Policies, Ecolab may  
13 choose which of the Policies or policy year(s) will be required to pay up to its or their  
14 applicable policy limits for the Slamer Lawsuit, so long as there is loss covered by the  
15 Policies in effect during that policy period. *See Montrose Chem. Corp. v. Super. Ct.*, 9  
16 Cal. 5th 215, 237 (2020); *see also SantaFe Braun, Inc. v. Ins. Co. of N. Am.*, 52 Cal. App.  
17 5th 19, 25 (2020). If and when coverage under the Policies or in that policy year is  
18 exhausted, Ecolab may select additional policies or policy years to provide coverage,  
19 until Ecolab is made whole for its losses.

20 25. On the other hand, ACE appears to contend that Ecolab does not have a right  
21 to select among the triggered policy years, and instead Ecolab must demonstrate  
22 exhaustion of all triggered primary policies before the Policies have any obligation to  
23 respond to the Slamer Lawsuit.

24 26. The controversy between Ecolab and ACE is ripe for judicial review.

25 27. The controversy is of sufficient immediacy to justify the issuance of a  
26 declaratory relief.

27 28. Ecolab accordingly seeks a declaration from the Court that:

- 1 a. Ecolab may choose which of the Policies or policy year(s) will be  
2 required to pay up to its or their applicable policy limits for the Slamer  
3 Lawsuit, so long as there is loss covered by the Policies in effect during  
4 that policy period; and
- 5 b. When coverage under the Policies, or in that policy year, is exhausted,  
6 Ecolab may select additional policies or policy years to provide coverage,  
7 until Ecolab is made whole for its losses.

8 **SECOND CLAIM FOR RELIEF**

9 FOR DECLARATORY RELIEF RE: VERTICAL EXHAUSTION

10 29. Ecolab repeats and incorporates by reference each and every allegation  
11 contained in the preceding paragraphs as though fully set forth herein.

12 30. An actual controversy of a justiciable nature presently exists between Ecolab  
13 and ACE with respect to the rights and duties of ACE under the Policies.

14 31. Ecolab contends, and ACE disputes that, subject to applicable terms of the  
15 Policies, ACE's obligations attach upon the exhaustion of the specified, retained limit in  
16 the Policies, and without regard to whether the limits of primary policies issued in other  
17 years remain unexhausted. *See SantaFe Braun*, 52 Cal. App. 5th at 31.

18 32. The controversy is of sufficient immediacy to justify the issuance of a  
19 declaratory relief.

20 33. Ecolab accordingly seeks a declaration from the Court that:

- 21 a. ACE's obligations under the Policies attach upon the exhaustion of the  
22 specified, retained limit in the Policies, and without regard to whether the  
23 limits of primary policies issued in other years remain unexhausted.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Ecolab demands judgment and prays that this Court grant relief as follows:

1. On its First and Second Claims for Relief, for a declaratory judgment in favor of Ecolab and against ACE declaring that:

- a. Ecolab may choose which of the Policies or policy year(s) will be required to pay up to its or their applicable policy limits for the Slamer Lawsuit;
- b. When coverage under the Policies, or in that policy year, is exhausted, Ecolab may select additional policies or policy years to provide coverage, until Ecolab is made whole for its losses in the Slamer Lawsuit; and
- c. ACE's obligations under the Policies attach upon the exhaustion of the specified, retained limit in the Policies, and without regard to whether the limits of primary policies issued in other years remain unexhausted.

2. As to all Claims for Relief, an award of such other and further relief that the Court deems just and proper.

DATED: January 11, 2023

Respectfully submitted,

COVINGTON & BURLING LLP  
CHRISTINE S. HASKETT  
HEATHER W. HABES

By: Heather Habes  
HEATHER W. HABES

Attorneys for Plaintiff  
ECOLAB INC.

**DEMAND FOR JURY TRIAL**

Ecolab requests a trial by jury on all issues so triable.

DATED: January 11, 2023

Respectfully submitted,

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CHRISTINE S. HASKETT  
HEATHER W. HABES

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